



## THE CONSERVANCY Of Southwest Florida

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August 29, 2002

Ms. Sherry Scott, P.G.  
Water Policy Coordinator  
South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, Florida 33406

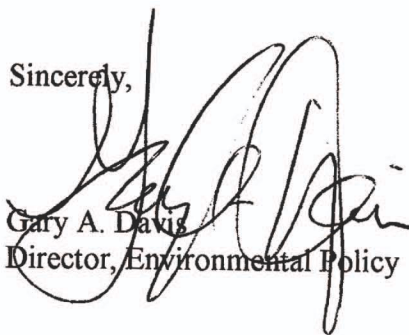
Re: Draft White Paper on "Reservation of Water for the Environment and Assurances  
for Existing Legal Sources Consistent with Federal and State Law"

Dear Ms. Scott:

The Conservancy of Southwest Florida appreciates this opportunity to comment on the Draft White Paper on Reservations of Water for the Environment and Assurances of Existing Legal Sources Consistent With Federal and State Law. The Conservancy is a thirty-eight-year-old non-profit organization with over 6,000 members throughout Southwest Florida. We have a strong interest in Everglades restoration and in the protection and restoration of the valuable estuarine and coastal watershed resources of our region.

On behalf of The Conservancy of Southwest Florida, I request that you incorporate these comments in a redraft of the strategy in the White Paper. Please inform me of the District's response to these comments and let me know what the next steps will be in the process.

Sincerely,



Gary A. Davis  
Director, Environmental Policy

**COMMENTS OF THE CONSERVANCY OF SOUTHWEST FLORIDA ON  
SFWMD DRAFT WHITE PAPER ON RESERVATIONS OF WATER FOR THE  
ENVIRONMENT AND ASSURANCES OF EXISTING LEGAL SOURCES  
CONSISTENT WITH FEDERAL AND STATE LAW**

August 29, 2002

**GENERAL COMMENTS**

The Conservancy of Southwest Florida believes that reservations of water for the environment are the key issue in Everglades restoration. Because of increasing demands and current water shortfalls, we are deeply concerned that by the time CERP projects are in operation, there will be no water available to reserve for the environment. Some watersheds, such as the Caloosahatchee River, may be over-permitted now, and, despite the required finding in every permit that there will be no adverse impacts, we are concerned that natural systems have not been protected in the consumptive use permitting process to date. We believe that there is a need to reserve water for the environment today, before the design and construction of CERP water projects.

Overall, while WRDA 2000 and the federal-state agreement make it clear that water for environmental restoration is the top priority of the CERP, the White Paper places priority on determining and protecting "existing legal sources of water," which include consumptive uses for agriculture and water supply. We believe that a focus on determining and protecting existing consumptive uses first is backwards. In keeping with the explicit intent of WRDA 2000 and the federal-state agreement, the water necessary for the environment should be determined first, both the current environmental needs and the needs for Everglades restoration, not after protection of existing consumptive uses. CERP projects should be designed to deliver water for the environment, first and foremost, and expanded or modified as necessary to satisfy consumptive uses later.

The Conservancy has been encouraged by language in the White Paper and by discussions with District staff that the District is considering "pre-CERP" reservations for protecting fish and wildlife in estuaries in the region. For the Caloosahatchee and its estuary, especially, we strongly urge the District to expedite this process to ensure that the allocation of "baseline" water through consumptive use permitting and flood control management does not destroy the resource before additional water is made available from CERP projects in the basin. Any baseline for the Caloosahatchee should include enough water to make protection of natural systems a reality today.

It is not just the natural system that will suffer if the resources provided by the Caloosahatchee and other coastal estuaries are destroyed. The economy of the region will also suffer. It has been estimated that the Caloosahatchee estuary alone contributes \$147 million to the regional economy.

## COMMENTS ON SPECIFIC SECTIONS

Specific comments follow that are referenced to the page number and line number of the White Paper:

Page 6, line 28-42:

We would like the White Paper to clarify whether the language of the WRDA “savings clause” in Section 601(h)(5) means that the water necessary for fish and wildlife in the Caloosahatchee, for instance, will be considered an “existing legal source of water.” How and when will the amount of this water be determined? If this is considered as part of the baseline, how is this water protected now? This water has not been reserved or protected through the CUP permitting process to date. Protection of this water should not have to await the construction of CERP projects.

Page 7, line 11-20:

We would like the White Paper to explain how the District intends to implement Section 373.1501(5)(a). Will this analysis and evaluation proceed now or after the operation of CERP projects for additional water?

Page 7, line 22-28:

Section 373.1501(5)(d) protects “existing legal users,” but this term has not been defined in either the statute or the District’s rules. Can “existing legal users” include water necessary for fish and wildlife, as “existing legal sources” does under WRDA?

Page 8, line 1-28:

We are concerned that the state reservations provision may not be broad enough to reserve sufficient water for natural systems, because it only focuses on reserving water from consumptive uses. It does not take into account reduction of available water by filling of wetlands as a result of ERP decisions. Nor does it take into account the reduction of available water by operational decisions of the District or the U.S. Army Corps of Engineers, such as the lowering of Lake Okeechobee for flood control. Part of the program for pre-CERP reservations should include the development of operational protocols for the entire water management system for South Florida so that the system protects fish and wildlife resources.

We would support a process for determining whether certain “existing legal uses” are contrary to the public interest as part of the creation of new reservations. There may be “existing legal uses” in the Caloosahatchee basin now that are contrary to the public interest, as evidenced by extensive low flow impacts and MFL rule exceedences. These conditions have resulted from an operation schedule for Lake Okeechobee that emphasizes storage for uses other than the estuarine environment.

Page 9, lines 24-41:

We are concerned that water reservations for natural systems will not be protected with severe droughts. In droughts that are 1:10 or worse, natural systems would be part of the “shared adversity” approach. In practice, however, the District has been reluctant to impose restrictions upon consumptive uses during droughts and natural systems have borne more than their share of the adversity. We believe the District should establish reservations that function during the full range of drought conditions. Anything less would seem to be inconsistent with the intent of WRDA 2000.

Page 10, lines 36-38:

For the Caloosahatchee consumptive use permitting criteria do not currently prevent harm to water resources up to and including the one in ten year drought frequency. These problems need to be resolved before the pre-CERP reservation can be effectively determined. In other words, we believe that a pre-CERP reservation for the Caloosahatchee should be on top of the MFL and “no harm” standards.

Page 12, line 30-34:

While this principle includes the quality of the water for the baseline, and WRDA speaks in terms of quantity and quality of water for the environment, there is no discussion in the White Paper about how the quality of the water that is reserved for protection of fish and wildlife will be ensured. This has been an issue in the Caloosahatchee and Okeechobee system with polluted back-pumped agricultural runoff used to provide freshwater flows for the estuary.

Page 13, line 1-9:

This principle needs to be clarified, particularly for a pre-CERP baseline for water necessary for fish and wildlife. If the Caloosahatchee River, for instance, had ample freshwater flow in 1995, but not in December 2000, what would the baseline be for water for fish and wildlife?

Page 13, line 19-40:

If projects and operations in place as of December 2000 were considered part of baseline, would MFLs also be considered part of baseline?

Page 13, line 42-46:

It is unclear how local rainfall, surface storage, and runoff can be regional sources of available water. If these local sources were allocated to the region, then they would no longer be available locally.

Page 14, line 4-5:

While sources may vary with precipitation and hydrology, we do not believe that they should be assigned priority based on manipulation of the sources for human needs. This could mean that the environment is always assigned the least reliable sources.

Page 14, line 7-16:

We disagree with the principle as stated. We strongly support a principle, as discussed in the issue statement, that demands should be based upon actual water used, not permitted amounts, particularly where there is no potential for permitted amounts to be used. For instance, a CUP may be issued for a project, but other permits are not issued, and the project is abandoned. Or the project is permitted and constructed, but at a reduced size. It does not make sense for the full permitted amount to be considered a demand.

The relationship of “demands” to the determination of “existing legal sources” should be explained.

For agriculture, we support a principle to include only crop acreage actually irrigated. These actual uses have resulted in low flows in the Caloosahatchee without taking into account permitted acreage.

Page 14, line 26-29:

We support the inclusion of MFLs as demands.

Page 14, line 30-37:

We support the inclusion as demands of water deliveries for wetland protection, aquifer recharge, other resource protection, and fish and wildlife. It is unclear whether the use of the term “regional environmental areas” is intended to restrict fish and wildlife “demands” to certain specific areas or whether the term is used generally. Does this mean that water necessary for fish and wildlife in other areas cannot be considered a demand?

Page 14, lines 39-42:

Historic operational deliveries under federal regulation schedules have caused extensive impacts from low flows to the Caloosahatchee Estuary and, as such, should not represent fish and wildlife demands.

Page 15, line 9-17:

Again, it is unclear how the definition ties in with the definition of “demands” on page 14. Instead of demands, the term “of which there was a dependence” is used. Is this synonymous with “demands”?

We support the inclusion of resource protection and protection of fish and wildlife as existing legal sources. The problem, however, is the fact that these sources are not being protected now. We want to make sure that these sources are protected prior to the CERP reservations, so that they do not have to compete with Everglades restoration.

Existing legal sources, as defined, may not be consistent with the District's "presently existing legal uses of water," particularly if the District interprets this second term as including permitted consumptive uses instead of actual uses.

Page 15, line 19-28:

Would the operational conditions that existed in December 2000 determine the amount of water reserved for fish and wildlife in the Caloosahatchee, for instance, even if the operational conditions as of that date resulted in reduced freshwater flows that were much less than those that prevailed under previous operational conditions?

Page 16, Table and Figure 3:

We are concerned that the Caloosahatchee has been classified as an agricultural legal source user basin. Was this based on hydrology, water use, or economic activity? The water naturally flows to the estuary, serving fish and wildlife. Most of the economic activity is urban. We also request that both the Caloosahatchee estuary and Estero Bay be classified as legal source user basins for environmental purposes.

Page 17, line 4-16:

The pre-CERP baseline is supposed to estimate the amount of water available to the environment. Yet, the proposal is to exclude "regulatory discharges," because these have not been historically depended on by the natural system. "Regulatory discharges" is not defined in the document, but the term has been used to refer to discharges from Lake Okeechobee based upon the Corps of Engineers schedule for regulating lake levels. Regulatory discharges from Lake Okeechobee, including discretionary releases under the WSE schedule, are often the only sources of water to maintain the Caloosahatchee Estuary under dry season conditions. We suggest that regulatory discharges are an important component of flow maintenance for compliance with the MFL Recovery and Prevention Plan to the Caloosahatchee Estuary during the dry season and as such should be included in the volume probability curve. We also believe that there is no basis for assuming that higher wet season flows have not been historically depended on by the natural system. Wet season flows of freshwater in the Caloosahatchee would have been historically higher than dry season discharges prior to the control structures and regulatory releases, leading to fish and wildlife dependence on these fluctuations. Does this proposal mean that only the dry season flow can be considered as necessary for fish and wildlife?

Page 18-24:

While WRDA and state law provide that the water that is reserved for natural systems from CERP projects should meet water quality standards, the discussion of how CERP reservations will function only deals with quantity and not quality. Nutrients and other pollutants delivered to estuaries through restored flows in the Everglades may create more damage to those ecosystems.

Page 21, line 9-39:

This section on pre-CERP water reservations for the environment focuses on water for the Everglades Protection Area. We believe strongly that other pre-CERP reservations should be made for estuaries and coastal watersheds throughout the region.

Page 26, Figure 1:

The line in the figure for “Existing Environmental Performance (2000)” should not be the baseline for the environment. This line should include a pre-CERP reservation for the environment that is sufficient to protect fish and wildlife.

Page 28, Figure 3:

The figure should also show the western part of the Caloosahatchee basin.

Page 42, lines 29-31:

We again suggest that actual use be viewed as a demand condition assumption. Even this level of use has restricted needed flows from Lake Okeechobee to the Caloosahatchee Estuary under drought and other dry season conditions.

Page 42, line 40:

Tidal discharges that are necessary to protect fish and wildlife must be included in demands.

Page 43, lines 1-3:

Again (note page 14 comment), historic operational deliveries have been damaging to fish and wildlife in the Caloosahatchee Estuary and should not be considered appropriate demands for fish and wildlife.

Page 49, line 42-45:

How are the boundaries of these “environmental areas” defined? Do they include upstream areas and flow ways?